NO. 79027-2

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent and Cross-Petitioner,

v.

DAN PAULSON CONSTRUCTION, INC., a Washington corporation, KAREN and JOSEPH MARTINELLI, and the marital community composed thereof,

Petitioners.

MUTUAL OF ENUMCLAW INSURANCE COMPANY 'S RESPONSE TO MARTINELLI'S MOTION TO STRIKE A PORTION OF THE SUPPLEMENTAL BRIEF

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I. MUTUAL OF ENUMCLAW'S SUPPLEMENTAL BRIEF AND THE MARTINELLI'S PENDING MOTION.

In its original Briefs, Mutual of Enumclaw aptly explained why the judgment entered by the trial court in favor of the Martinellis against Mutual of Enumclaw Insurance Company (MOE) should be reversed. In its Supplemental Brief in this court, MOE reinforced its arguments, and supported the decision by the Court of Appeals which reversed the trial court judgment.

However, in its Supplemental Brief, MOE requested this court go one step further. MOE requested that this court not only affirm the reversal of the trial court judgment, but further requested that this court announce a broader rule which would disprove of the consistent gamesmanship which insureds and claimants now engage in an attempt to create insurance coverage where it does not otherwise exist. Specifically, at pages 6 – 9 of its Supplemental Brief, MOE requested this court to declare that when insureds breach their duty of good faith owed by them to their insurer, they are not entitled to seek insurance coverage by estoppel.

Upon examining this issue, the Martinellis filed the pending motion in which they request the court to strike this additional MOE argument. The Martinellis are correct in stating that MOE's request for a

broad statement holding that improper conduct by an insured should preclude coverage by estoppel was not made to the trial court or the court of appeals. However, the Martinellis are incorrect in asserting that this court does not have the authority to disapprove the self-serving, bad faith conduct engaged in by Dan Paulson Construction, Inc. (Paulson).

II. THIS COURT HAS THE INHERIT AUTHORITY TO CONSIDER PROPOSITIONS OF LAW RAISED FOR THE FIRST TIME IN A SUPPLEMENTAL BRIEF.

It is the general rule that this court will normally decline to consider an issue raised for the first time in a Supplemental Brief filed in this court. *Shoreline Community College District No. 7, vs. Employment Security Department, 120 Wn.2d 394, 402, 842 P.2d 938 (1993).* However, this court has the inherit authority to consider a new proposition of law if such consideration is necessary to reach a proper decision. Id.

In *Shoreline Community College*, the Employment Security Department raised for the first time in a Supplemental Brief a public policy argument that had neither been raised in the trial court or Court of Appeals. The petitioner Shoreline Community College, moved to strike the newly raised argument. The specific newly raised argument was the contention by the Employment Security Department that public policy

expressed in a statute precluded the waiver of the right of an employee to seek unemployment compensation in the future. That new argument constituted an unasserted affirmative defense to the claims brought by Shoreline Community College. This court held that the statute based public policy argument, though not raised until the Supplemental Brief. should be considered. The courts opinion then extensively discussed and ultimately resolved the public policy argument raised by the Employment Security Department.

III. THE ADDITIONAL PUBLIC POLICY ARGUMENT PRESENTED BY MOE SHOULD BE CONSIDERED BY THIS COURT.

Like the public policy issue raised in *Shoreline Community College,* issues related to insurance coverage by estoppel and bad faith by insureds. involve significant issues of public policy set forth in a statute.[1] Every governmental entity, business organization and individual in this state is impacted by the cost of insurance. It is for that very reason that all issues related to insurance are considered to be matters which must be governed by determining what is in the publics' best interest.

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[1] RCWA 48.01.030. Public Interest.
The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

For this court to countenance steps by an insured which are designed to try to force an insurance company to pay for uninsured million dollar claims would not only turn a blind eye to the public interest regarding insurance, but would only encourage the continued gamesmanship in which insureds now regularly engage in their attempt to avoid their own financial obligations. We certainly must tip our hat to the ingenuity of those who have fostered the growing industry of seeking insurance coverage for uninsured claims. However, these narrow focused efforts by individual insureds must give way to the broader public interest. Therefore, we request this court to review the public interest issue and advise all future litigants that there are consequences for thwarting an insurance company's legitimate attempt to determine insured and uninsured claims.

The Martinelli's motion should be denied and this court should announce a rule that protects the integrity of insurance.

DATED this 23rd day of May, 2007.

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